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No. 84-66

In the Supreme Court of the United States

October Term, 1984

WINE AND SPIRITS SPECIALTY, INC.,
A Missouri Corporation,
Appellant,

vs.

EDWARD D. DANIEL, Director, Department of Public Safety, JAMES A. FRANKLIN, JR., Supervisor, Division of Liquor Control,
Appellees,

and

MISSOURI WINE AND SPIRITS ASSOCIATION, INC.,
Appellee-Intervenor.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of whether Missouri's price posting statutes, §§ 311.332, 311.334, 311.336, and 311.338, RSMo 1978, and Department of Liquor Control Regulation 11 C.S.R. 70-2.190 (the price posting laws), are in conflict with the Sherman Act, 15 U.S.C. § 1 (1976), and are therefore unconstitutional under the Supremacy Clause of the United States Constitution.

The statutes are found within the Liquor Control laws of the State of Missouri which regulate the various phases of the liquor industry. Under these laws, the manufacturers, wholesalers, and retailers are characterized as separate phases of the liquor traffic, each requiring separate licenses from the State of Missouri. Within this framework, § 311.332 makes it unlawful for any wholesaler to discriminate between retailers or to grant, directly or indirectly, any discount for quantity and payment in excess of 1% apiece. As a means of furthering this anti-discrimination section, §§ 311.334 and 311.336 require the wholesalers to file a monthly schedule of their own prices which they intend to charge and the discount they intend to grant to retail sellers (retail licensees). The Supervisor of Liquor Control then makes this information available for inspection by all wholesalers. Within three days thereafter, each wholesaler may reduce (but not increase) prices to meet (but to go below) lower competing prices and discounts.

B. The Proceedings Below

The appellant, a licensed wholesale dealer in Missouri, filed a suit for declaratory judgment seeking to declare the Missouri "price posting laws" unconstitutional as conflicting with § 1 of the Sherman Act and therefore running afoul of the Supremacy Clause of the United States Constitution.

The Circuit Court on stipulated facts found in favor of the appellant and the appellees appealed. The Supreme Court of Missouri reversed the Circuit Court, holding there was no conflict between the state scheme and § 1 of the Sherman Act. The opinion is found at 666 S.W.2d 416 (Mo. banc 1984).

II.

ARGUMENT

The case presents no substantial question not previously decided by this Court.

The Missouri Supreme Court in analyzing whether the Missouri price posting statutes were unconstitutional under the Supremacy Clause of the United States Constitution relied on *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) and *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The Missouri Supreme Court found, on stipulation of the parties, that price posting laws do not authorize or compel wholesalers tc agree among themselves for the purpose of contracting, combining, or conspiring to fix prices. *Wine and Spirits Specialty, Inc. v. Daniels*, 666 S.W.2d at 419. The Missouri Supreme Court found this did not create a conflict with the Sherman Act because the conduct contemplated by the statute was not in all cases a *per se* violation of § 1 of the Sherman

Act as required by *Rice v. Norman Williams Co.*, 458 U.S. at 659. The Missouri Supreme Court declined, on the record presented, to decide whether a conflict existed under a "rule of reason" analysis.

Under the facts stipulated by the parties, found by the Missouri Supreme Court, and binding on this Court, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963), the statute does not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases, or place irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. The statute does no more than disseminate price information among competitors. The dissemination of price information is, at most, a rule of reason violation. *United States v. Citizens and Southern National Bank*, 422 U.S. 86 (1975).

The Missouri scheme is almost identical to the price posting scheme approved by this Court in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Because of this ruling and the criteria for preempting the state statutes set forth in *Rice v. Norman Williams*, 458 U.S. 654 (1982), this case presents no substantial federal question which would require full briefing and oral argument.

As recently as March 19, 1984, this Court dismissed an appeal from the Supreme Court of New Mexico raising similar issues. *United States Brewers Association v. The Director of the New Mexico Department of Alcoholic Beverage Control*, 668 P.2d 1093 (N.M. 1983), appeal dismissed, 104 S.Ct. 1581 (1984).

Appellant argues in his jurisdictional statement and question presented herein, as he did in the Missouri Supreme Court, that an anti-competitive effect of the statute alone is enough to hold the Missouri statutes unconstitutional. Although the stipulation by the parties was that the

statutes *may* have an anti-competitive effect, an anti-competitive effect alone is insufficient to create a conflict between the state statute and the federal antitrust laws. *New Motor Vehicle Board of California v. Warren W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this case depends is so unsubstantial as to not need further argument, and appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

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